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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

CECIL C. CAMPBELL, CIRCUIT CLERK AND REGISTRAR OF SUNFLOWER COUNTY, MISSISSIPPI, ET ALS.,
Petitioners,

VS.

MRS. FANNIE LOU HAMER, ET AL.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, which is not reported, is set forth in Appendix A, *infra*, pp. A1-A6. The opinion of the United States Court of Appeals for the Fifth Circuit has been reported at 358 F.2d 215 (Advance Sheets, May 23, 1966), and is set forth in Appendix A, *infra*, A7-A22.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed here was entered March 11, 1966. Petitioners filed a Petition for Rehearing *En Banc,* in the Court of Appeals, which was denied April 6, 1966. The mandate of the Court of Appeals was issued to the District Court on April 15, 1966.

The jurisdiction of this Court is invoked by the provisions of 28 U.S.C., Section 1254 and 28 U.S.C., Section 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in granting Plaintiffs the extraordinary relief of mandating the District Court to set aside the municipal elections in the Town of Sunflower, Mississippi, and to order new elections held and to have a hearing on the issue of whether the municipal elections in other towns of Sunflower County, Mississippi should be set aside and new elections held?

2. Did the Court of Appeals err in holding that the Plaintiff, Mrs. Annie Mae King, had standing to bring a class action to enjoin the holding of elections in the Town of Sunflower, Mississippi?

3. Did the Court of Appeals err in holding that the District Court should have suspended the Mississippi poll tax requirement for voting as to Plaintiffs, even though it was undisputed and conceded that there was no evidence in the record showing discriminatory application of the poll tax requirement for voting in Sunflower County, Mississippi?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A text of the following constitutional provisions and statutes involved in this Petition for Certiorari are set forth in Appendix B, *infra,* pp. A23-A38:

28 U.S.C., Section 1331.

28 U.S.C., Section 1343.

28 U.S.C., Section 1344.

42 U.S.C., Section 1971 (as it existed on May 4, 1965, when the case was decided by the District Court).

42 U.S.C., Section 1981.

42 U.S.C., Section 1983.

Section 10, Voting Rights Act of 1965.

Section 241 of the Constitution of Mississippi.

Section 3235 of the Mississippi Code 1942, Annotated (as it existed on May 4, 1965, the date this case was decided by the District Court).

Section 9751 of the Mississippi Code 1942, Annotated.

STATEMENT OF THE CASE

On April 23, 1965, Complaint was filed in the United States District Court for the Northern District of Mississippi, Greenville Division, by Mrs. Fannie Lou Hamer and others against Cecil C. Campbell, Circuit Clerk and Registrar of Sunflower County, Mississippi, the Municipal Election Commissioners of the Towns of Ruleville, Indianola, Drew, Moorhead, Inverness, Sunflower, Rome and Doddsville, Mississippi and certain State officials comprising the State Board of Election Commissioners. The Plaintiffs claimed to be members of the Negro race and to sue on behalf of all Negro citizens residing in Sunflower

County, Mississippi. The Plaintiff, Mrs. Fannie Lou Hamer, claimed to be a qualified registered voter in the Town of Ruleville, Mississippi, and that she desired to run for municipal office in Ruleville in the forthcoming municipal elections, with general municipal elections scheduled to be held on June 8, 1965 and primary municipal elections scheduled to be held on May 11 and May 18, 1965. It was further alleged that Mrs. Hamer "sues on her own behalf and on behalf of other Negro citizens of Sunflower County who intend and desire to run for elective municipal office in the various municipalities in Sunflower County."

Jurisdiction of the District Court was asserted pursuant to 28 U.S.C., Sections 1331, 1343, and 1344, and 42 U.S.C., Sections 1971, 1981 and 1983.

The Complaint stated that on April 8, 1965, the District Court had entered an Order and Decree for a permanent injunction in a voter registration case brought by the United States, *United States of America* v. *Cecil C. Campbell et al.*, No. GC633, in which it was found and held that Cecil Campbell, the Registrar of Voters of Sunflower County, had engaged in a pattern or practice of racial discrimination in handling applications to register to vote. It was further alleged that the Laws of the State of Mississippi require that in order to be eligible to be a candidate for municipal office or to vote in a municipal election, a citizen must be a qualified elector of the municipality, and that pursuant to State Law (Section 3374-60 of Mississippi Code 1942, Annotated) a municipal elector must have been registered in a municipality more than four months prior to the general election in order to vote in the primary and the general election, so that the last day to register to vote in the primaries or June 8 general election was February 8, 1965. The Complaint alleged that unless the municipal elections in Sunflower County were ordered postponed by

the District Court so as to provide a new and later cut-off date for registrations to vote in order to participate in said municipal elections, and to provide a later cut-off date for candidates to qualify for municipal office, that the Negro citizens of Sunflower County would be irreparably injured by being effectively excluded from participation in the municipal affairs of that County. It was also stated that, under State Law, a candidate for the May 11 primary election must have qualified as a candidate by March 12, 1965, and that the final date for an independent candidate to qualify for the June 8 general election would be April 30, 1965.

The Complaint prayed that the Court issue an injunction postponing the holding of the primary and general municipal elections in the various municipalities of Sunflower, and that a Judgment issue that:

(a) The general municipal elections for all municipalities in Sunflower County be held during the month of October, 1965, and

(b) That any registered voter in Sunflower County who has registered on or before September 30, 1965, may vote in the general elections; and

(c) That any person desiring to be a candidate in the general elections may qualify at any time up to fourteen days prior to general elections; and

(d) That any requirements for voting predicated upon a prior payment of poll tax be suspended for this general election, or in the alternative, if this relief not be granted, that all payments of back due poll taxes be permitted to be made on or before September 30, 1965; and

(e) That any primary election be held not earlier than three weeks preceding the date set for the general election; and

(f) That any registered voter in Sunflower County who has registered at any time on or before five days prior to said primary elections be permitted to vote; and

(g) That any person desiring to be a candidate in such primary elections may qualify at any time up to fourteen days prior to said elections, and for further relief.

On April 29, 1965, the various Defendants filed a response to show cause Order and opposition to Motion for Preliminary Injunction, in which it was stated that Plaintiff, Mrs. Fannie Lou Hamer, had for some time been a qualified elector of the Town of Ruleville, Mississippi, and could have qualified to run in the primary election for municipal office, but that Mrs. Hamer had failed to attempt to qualify as a candidate for office.

The Defendants from the Town of Indianola stated that that municipality is incorporated under a special charter from the State of Mississippi and that municipal primary and general elections were not to be held in that Town until November 23, 1965 and December 14, 1965, respectively.

The Defendants from the Town of Drew, Mississippi, stated that none of the Plaintiffs reside within the corporate limits of Drew, Mississippi, and that therefore, they have no capacity or standing to maintain a suit to postpone the elections in that Town.

The same statement was made on behalf of the Defendants from the Town of Moorhead, Mississippi, Doddsville, Mississippi, and Inverness, Mississippi.

The Defendants, representing the Town of Sunflower, Mississippi, stated that the Plaintiff, Mrs. Annie Mae King, a resident of the Town of Sunflower, had failed to pay her poll taxes for the years 1963 and 1964 as is required in

order to vote in a municipal election during the year 1965, and that the said Mrs. King is without capacity to bring this suit to challenge the holding of the primary or general elections for the election of municipal officials in 1965.

A hearing was held on Plaintiffs' Motion for a Temporary Injunction on April 29, 1965, in the United States District Court for the Northern District of Mississippi, at Oxford, Mississippi, before Honorable Claude F. Clayton, United States District Judge. At that hearing, Plaintiffs called three witnesses to testify and introduced one exhibit. The Defendants introduced nine exhibits.

On May 4, 1965, the District Court entered an Order denying the Motion for Temporary Injunction, and also filed an accompanying Memorandum Opinion.

In its opinion the District Court found that:

1. The Town of Indianola was not involved in the Motion for Temporary Injunction, because its municipal elections were not scheduled until December, 1965. The Town of Rome, Mississippi was not involved because it apparently no longer exists as a municipality.

2. Only two of the six remaining municipalities, Ruleville and Sunflower, are represented by any party Plaintiff. The Ruleville Plaintiff, Mrs. Hamer, had been a qualified elector of said Town, but did not qualify as a candidate for office before the deadline because so few Negroes were qualified to vote that she would have had no chance to succeed, but that if the election were delayed a sufficient length of time, she would be a candidate for Mayor in the Democratic primary. There is no evidence that any other Negro would be a candidate in such delayed election for office in this municipality. Therefore, since there is no evidence of any class of prospective Negro candidates, she

cannot represent a non-existent group; and, since she is not a qualified voter in Ruleville, she is not a member of the class, composed of those people who are not presently qualified to vote, that she seeks to represent.

3. As to the Town of Sunflower, the Court found one Negro qualified elector testified that he had been busy since April 8 getting Negroes from this municipality to register, but that he lives outside the Town and in no event could be legally qualified to vote in Sunflower municipal elections.

Another witness from Sunflower (Mrs. Annie Mae King) testified that she was working to get people to register, and that if the elections were delayed, the Negro people would consider at an early date whether to offer Negro candidates or not, but that at the time of hearing she had no knowledge of any prospective Negro candidates in that municipality. She admitted that she had not paid poll taxes and thus is not now a qualified voter. Thus neither of the two Sunflower Plaintiffs qualify as Plaintiffs in a class action since neither of them belong to the class they seek to represent, in that neither is a prospective candidate for public office.

4. There is no evidence in the record that there has been any discrimination against the Negroes in Sunflower County with respect to the payment of poll tax.

5. There is only one prospective Negro candidate (Mrs. Fannie Lou Hamer) in one municipality in Sunflower County—none in any of the other five municipalities remaining. She could have qualified as a candidate in the elections as now scheduled.

On May 6, 1965, Plaintiffs filed a notice of appeal from the District Court's Order denying their Motion for Temporary Injunction to the United States Court of Appeals for

the Fifth Circuit, and on that same date filed an application for emergency relief in the Court of Appeals.

On May 10, 1965, the Court of Appeals denied a Motion for Injunction pending appeal filed by Plaintiffs.

On May 6, 1965, Plaintiffs filed a Second Supplemental Complaint in the District Court, in which additional parties Plaintiffs from other municipalities in Sunflower County were added as parties. On May 14, 1965, Plaintiffs filed a Third Supplemental And Amended Complaint in the District Court alleging that primary elections had been held on May 11 in Ruleville, Drew, Moorhead, Inverness, Sunflower and Doddsville; that these elections were null and void, and praying that the promulgation of their results should be enjoined and said elections set aside.

On May 14, 1965, Plaintiffs filed in the Court of Appeals an Application for Expeditious Hearing of Appeal from the District Court's denial of their Motion for Temporary Injunction, and on May 20, 1965, the Court of Appeals denied said Application.

The appeal was briefed and argued by the parties in the Court of Appeals, and on March 11, 1966, the Court of Appeals rendered an Opinion reversing the decision of the District Court. 358 F.2d 215 (Advance Sheets, May 23, 1966).

The Court of Appeals affirmed the holding of the District Court as to the standing of Plaintiffs to maintain a class action for injunctive relief, except the Court of Appeals held that the Town of Sunflower Plaintiff, Mrs. Annie Mae King, had standing to sue. The Court of Appeals further held that the fact that Mrs. King had failed to pay her Mississippi poll taxes so as to qualify her to be a voter, should not bar her from bringing an action to enjoin

the municipal elections, even though there was nothing in the record to indicate that there had been any discriminatory application of poll tax collections in Sunflower County. The Court of Appeals found support for this holding in the theory of "freeze relief" applied by that Court in the case of *United States* v. *Dogan*, 314 F.2d 767, and by the provisions of Sections 10(a), (b) and (d) of the Voting Rights Act of 1965. The Court of Appeals ordered the District Court to set aside the municipal elections in the Town of Sunflower and to order new elections held. The Court also instructed the District Court to conduct a hearing to determine whether, on remand, there were other proper parties Plaintiff in other municipalities of Sunflower County named in the Second Supplemental Complaint filed by Plaintiffs. The Court held that if, on such hearing, it developed that there were such other proper parties Plaintiff in other municipalities, that the District Court should also order the elections in those municipalities set aside and new elections held.

Petitioners filed a timely Petition for Rehearing *En Banc* in the Court of Appeals on March 30, 1966, which the Court denied on April 6, 1966.

On May 24, 1966, Petitioners filed in the Court of Appeals a Motion for Stay of the Execution of Judgment and Mandate to permit them to file a Petition for Writ of Certiorari in this Court. The Court of Appeals, on June 7, 1966, denied that Motion, but suspended the execution of its Judgment and Mandate issued April 15, 1966, for ten days to permit Petitioners to seek a Stay in this Court.

Petitioners filed a Motion for Stay in this Court on June 13, 1966, in order to permit them to file a timely Petition for Writ of Certiorari to review the decision of the Court of Appeals. This Court granted, on June 17, 1966, the Application for a Stay of the Mandate of the Court of Appeals as prayed for by Petitioners.

REASONS FOR ALLOWING THE WRIT

1. The Court of Appeals Erred in Granting Plaintiffs the Extraordinary Relief of Mandating the District Court to Set Aside the Municipal Election in the Town of Sunflower, Mississippi and to Order New Elections Held and to Have a Hearing on the Issue of Whether the Municipal Elections in Other Towns of Sunflower County, Mississippi Should Be Set Aside and New Elections Held.

The District Court, in its opinion in this Case, correctly weighed the competing equities of the parties, and came to the conclusion that it would not be a sound exercise of judicial power to postpone and re-schedule the impending municipal elections in Sunflower County, Mississippi. It should be pointed out that the Complaint in this Case was not filed until April 23, 1965, and that the date for the first primary election was May 11, 1965. The election machinery for these municipalities had already been set up and was functioning. The ballots for said May 11 Primary Election had already been printed.

No doubt the District Court was guided by the principles recently enunciated by this Court in some of the reapportionment cases. In *Reynolds* v. *Sims,* 377 U.S. 533, 12 L.Ed.2d 506, this Court discussed the proper use of equitable power by way of injunctive relief under circumstances similar to this Case, as follows:

> "It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid Plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might

justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." (377 U.S. 585, 12 L.Ed.2d 541).

See also *Roman* v. *Sincock*, 377 U.S. 695, 710, 12 L.Ed. 2d 620, 630.

We submit that, applying the language of this Court cited above in *Reynolds* v. *Sims, supra,* to the facts of this Case, that the Court of Appeals abused its equitable discretion in ordering the District Court to set aside the Municipal Elections in the Town of Sunflower and to order new elections held.

This holding of the Court of Appeals is in conflict with the holding of this Court above mentioned in *Reynolds* v. *Sims, supra*, and should be reversed.

2. The Court of Appeals Erred in Holding That Plaintiff, Mrs. Annie Mae King, Had Standing to Bring a Class Action to Enjoin the Holding of Municipal Elections in the Town of Sunflower, Mississippi.

The District Court correctly found that neither of the two plaintiffs from the Town of Sunflower qualified as plaintiffs in a class action, because neither was a prospective candidate for municipal office in that Town and neither knew of a prospective class of candidates. This

finding by the District Court is amply supported by the record evidence. Mrs. Annie Mae King was one of the witnesses for plaintiffs at the hearing held on April 29, 1965, in the District Court at Oxford, Mississippi. There is a transcript of that hearing in the record in this cause filed with this Court. On direct examination, Mrs. King testified:

> "Q. And do you know whether the Negro people in Sunflower are considering offering a candidate in municipal elections for Sunflower?
>
> A. Not as of now, I don't.
>
> Q. But if the election is held up for some time will you then offer a candidate?
>
> A. Well, we will consider it at an early date." (T. 34).

The Court of Appeals affirmed the holding of the District Court as to the standing of the Ruleville Plaintiff, Mrs. Hamer, to maintain a class action, and correctly stated the law as pertaining to standing, as follows:

> "The principal obstacle to her effort was that she had become a qualified elector by registering and paying all necessary poll taxes prior to the March 12 cutoff date for filing as a candidate, and the election officials of Ruleville testified that had she so filed, her name would have been put on the ballot. She did not dispute this, but instead explained her failure to file by the assumption that it would be impossible to win with only one percent of her race eligible to participate in the election. See note 1, supra. We believe the District Court was warranted in holding 'this court cannot indulge in this assumption.' Also, there was no showing that any other Negroes intended to run for municipal office in Ruleville. Thus, there was no class of potential Negro candidates, and even if there were, Mrs. Hamer could not represent it since she could have been a candidate had she chosen to do so.

> Without a class on the one hand or a proper representative on the other, a class action pursuant to Rule 23(a) must fail. It is elementary that 'an individual suing in behalf of the members of a class must be a member of the class which he is supposed to represent.' " (358 F.2d p. 219).

Applying this Court's enunciation of the law to the undisputed facts relating to Mrs. King, there can be no question but what the Court of Appeals erred in holding that Mrs. King had standing to sue.

It is this erroneous holding which is at the heart of the Court of Appeals' reversal of the decision of the District Court, because the Court of Appeals found that Mrs. King was the only Plaintiff who had standing to sue.

This Court has many times stated the law regarding standing to maintain this type of class action for injunctive relief. The landmark case is *McCabe* v. *Atchison T. & S. F. R. Co.*, 235 U.S. 151, 59 L.Ed. 169. That was a case involving an action for injunctive relief against alleged racial discrimination. This Court held that, as a necessary prerequisite to obtaining class action injunctive relief, a showing must be made that an individual plaintiff has sustained irreparable injury, and that he is representative of a class. This Court said:

> "But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

"* * * The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks." (235 U.S. 162, 164).

Although we recognize that this Court does not ordinarily review factual matters decided by a lower Court on a Petition For Writ of Certiorari, we submit that the error of the Court of Appeals here in finding and holding that Mrs. Annie Mae King had standing on the basis of the record evidence and in the face of a finding by the trial Court to maintain a class action to enjoin the holding of municipal elections in the Town of Sunflower, was so basic and fundamental as to amount to an error of law, which should be reviewed and reversed by this Court. It is strange for the Court of Appeals to agree with the District Court with reference to Mrs. Hamer that it could not indulge in the assumption made by Mrs. Hamer that the reason she failed to qualify as a candidate in Ruleville was that it would be impossible for her to be elected when so few of her race were registered to vote, and yet indulge in the tacit assumption that Mrs. King would have paid her poll tax as required by Mississippi law if she had been registered to vote (358 F.2d 215).

The departure by the Court of Appeals from the well-settled law laid down by this Court and other Courts dealing with standing to maintain a class action for injunctive relief calls for review and reversal by this Court.

3. The Court of Appeals Erred in Holding That the District Court Should Have Suspended the Mississippi Poll Tax Requirement for Voting As to Plaintiffs, Even Though It Was Undisputed and Conceded That There Was No Evidence in the Record Showing Discriminatory Application of the Poll Tax Requirement for Voting in Sunflower County, Mississippi.

The holding by the Court of Appeals that the Plaintiff, Mrs. Annie Mae King, had standing to sue to enjoin the holding of municipal elections even though she had failed to meet the Mississippi payment-of-poll-tax requirement for voting, with no evidence that said poll tax requirement had been discriminatorily applied in Sunflower County, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Said holding by the said Court of Appeals has also decided incorrectly an important question of Federal Law which has not been, but should be, settled by this Court.

The District Court found, and the Court of Appeals agreed, that there was nothing in the record to indicate that there had ever been any discrimination in Sunflower County, Mississippi in the payment or collection of poll taxes. Indeed, there could be no other holding in the light of the testimony at the hearing held in the District Court on April 29, 1965 by the very Plaintiff, Mrs. Annie Mae King, as to whom the Court of Appeals held the poll tax requirement should be suspended. On cross-examination, Mrs. King testified about her failure to pay poll taxes, as required by Mississippi law, as follows:

"Q. Did you pay a poll tax for the year 1964?

* * *

The Witness: No.

By Mr. Wells:

Q. Did you pay your poll tax for 1963?

A. No. I wasn't registered. I didn't—they didn't consider—you know, there wasn't no restriction on poll tax. I paid property tax, but not—I haven't paid poll tax." (T. 36)

The Court of Appeals found two bases for holding that Mrs. King's failure to pay the poll taxes prerequisite to voting should not bar her from maintaining the suit to enjoin the municipal elections. Both of these bases are incorrect, and we will discuss them briefly in order.

First, the Court of Appeals found support from its holding in *United States* v. *Dogan*, 314 F.2d 767. In *Dogan*, it was found that the Sheriff of Tallahatchie County, Mississippi had discriminated against Negroes in the past in the payment and collection of poll taxes as a prerequisite to voting. After suit was instituted in the District Court by the United States to correct this discrimination, the Sheriff adopted a policy of instructing his office force that all first-time payers of poll taxes must personally pay their poll taxes to the Sheriff. The Court of Appeals merely held that, in light of the facts of that case, in which practically all of the eligible white citizens of Tallahatchie County had previously paid poll taxes, but that practically no Negroes had previously paid poll taxes because of the past discrimination by the Sheriff, that these office instructions of the Sheriff that all new payers, regardless of race, must personally pay the Sheriff their poll taxes, constituted an undue and unconstitutional burden on prospective Negro poll tax payers in that County. The Court of Ap-

peals only enjoined *that practice*, and did not suspend the payment of poll taxes as a prerequisite to voting.

It should be emphasized that the basis for even this limited relief was a finding that there had been past discrimination in the collection of poll taxes in Tallahatchie County. The reliance of the Court in *United States* v. *Dogan* is thus seen to be misplaced.

This Court has held in a series of Anti-Trust cases that in an injunctive action under the Anti-Trust Acts that *business practices* not illegal *per se* might be enjoined where acts legal in themselves were enmeshed in an illegal scheme. See *United States* v. *Bausch & L. Optical Co.*, 322 U.S. 707, 723-724, 88 L.Ed. 1024; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 148, 92 L.Ed. 1260; and *United States* v. *Loew's, Inc.*, 371 U.S. 38, 53, 9 L.Ed.2d 11.

However, this is a far cry from holding that the enforcement of a presumptively valid statute should be enjoined or suspended.

This Court has come to grips with the question of so-called "freeze relief" in voter registration cases. In *Louisiana* v. *United States*, 380 U.S. 145, 13 L.Ed.2d 709, this Court affirmed a holding by a District Court in Louisiana that the new Louisiana "citizenship" test for registration to vote should not be enforced in twenty-one Parishes of the State until those Parishes have ordered a complete re-registration of voters. This carefully limited holding was based on findings of fact that the Registrars of Voters in those twenty-one Parishes had, in the past, flagrantly discriminated against Negroes in the registration process, but had permitted White citizens to register to vote with little or no difficulty. In applying principles of equitable relief, this Court held that it was unfair discrimination to the Negro citizens of those twenty-one Parishes, the great

majority of whom were not registered to vote because of past discrimination in the registration process, to be subjected to the new "citizenship" test, even though fair on its face, while the vast majority of eligible White citizens of those Parishes would not be subject to the "citizenship" test because they were previously registered to vote (380 U.S. pp. 154-155).

So far as we are aware, no Court has ever held that the operation of a presumptively valid statute should be suspended absent a showing of discriminatory application.

Of course, classic "freeze relief" has no application to the payment of poll taxes, as it does to voter registration. Registration to vote in Mississippi and in the twenty-one affected Parishes in Louisiana is permanent. Thus, Whites can be frozen into the electorate and Negroes frozen out by discriminatory acts of Registrars of Voters. On the other hand, poll taxes in Mississippi must be paid annually, between December 1 and February 1. No one can be frozen in or out by the payment of poll taxes, and an injunction operating in the future to eradicate any discriminatory application of the poll tax requirement for voting would obviate the need for "freeze relief", which might be appropriate in registration cases.

It should be emphasized that at the time the District Court decided this case, on May 4, 1965, the poll tax requirement for voting in Mississippi was perfectly valid and constitutional. This Court had not yet invalidated poll tax requirements for voting in State elections. See *Harper* v. *Virginia State Board of Elections*, ... U.S. ....., 16 L.Ed.2d 169, decided March 24, 1966.

The *rationale* of the holding of the Court of Appeals in this case is that the District Court should have enjoined the holding of the municipal elections in the Town of

Sunflower, and since it failed to do so, the Court of Appeals had the right and duty to mandate it to order the elections set aside and new elections held.

Thus, by its own reasoning, the only proper question was whether the District Court should have issued the preliminary injunction on May 4, 1965 on the basis of the facts before it and the then applicable law. The Court of Appeals stated:

> "Since the District Court should have enjoined the election in the Town of Sunflower, we have concluded that under the special circumstance of this case we must now require that the District Court set it aside." (358 F.2d p. 222).

Second, The Court of Appeals relied on the provisions of Section 10 of the Voting Rights Act of 1965. Section 10(d) of the Act provides in part that during the pendency of an action to declare poll tax requirements for voting unconstitutional, a person shall not be denied the right to vote if he tenders payment of such tax for the current year to a proper official at least forty-five days prior to elections, whether or not such tender would be timely or adequate under State Law.

Again, it was clearly erroneous for the Court of Appeals to rely on the provisions of said Voting Rights Act to reach this result. The Voting Rights Act of 1965 was not enacted into law until August 6, 1965, some three months after the decision by the District Court. The provisions of the Voting Rights Act were not considered by the District Court in reaching its decision, and it is clearly wrong for the Court of Appeals to use that Act as a basis for holding that the District Court abused its discretion in not granting the Motion for Temporary Injunction on May 4, 1965.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court and that this Petition should be granted and Writ of Certiorari issued as contemplated by law

JOE T. PATTERSON
Attorney General of the State of Mississippi
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Assistant Attorney General of the State of Mississippi

By.....
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Of Counsel.

CERTIFICATE OF SERVICE

I, PETER M. STOCKETT, JR., Assistant Attorney General of the State of Mississippi, Post Office Box 220, Jackson, Mississippi, one of the attorneys for petitioners in this cause and a member of the Bar of the Supreme Court of The United States, hereby certify that I have on this day mailed, Air Mail, postage prepaid, one true and correct copy of the foregoing Petition For Writ Of Certiorari to each of the following attorneys of record for Mrs. Fannie Lou Hamer, et al., respondents:

Kunstler, Kunstler & Kinoy
511 Fifth Avenue
New York, New York

Smith, Waltzer, Jones & Peebles
305 Baronne Street
New Orleans, Louisiana

Morton Stavis
744 Broad Street
Newark, New Jersey 07102

This the ..... day of ....., 1966.

.....

PETER M. STOCKETT, JR.

APPENDIX "A"

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC6522

MRS. FANNIE LOU HAMER, ET AL,
Plaintiffs

v.

CECIL C. CAMPBELL, CIRCUIT CLERK AND REGISTRAR OF SUNFLOWER COUNTY, MISSISSIPPI, ET AL,
Defendants

Memorandum Opinion

This suit, filed as a class action by five Negro plaintiffs, seeks to delay by injunction the holding of primary elections on May 11 and May 18, 1965, and general elections on June 8, 1965, in all of the municipalities of Sunflower County, Mississippi[1] for a sufficient length of time to permit members of the Negro race to register en masse in order to vote in such delayed elections, under lower standards fixed for registration by an order of this court entered April 8, 1965, in the case of *United States* v. *Cecil C. Campbell, Registrar of Sunflower County, Mississippi,* (No. GC633). Such a delay would permit, so plaintiffs say, Negro candidates to qualify for such delayed elections and

1. Originally involved were eight municipalities. Indianola was eliminated by stipulation since it operates under a special charter which fixes its municipal elections in December 1965. Rome was not noticed for the hearing on April 29, 1965, and it is apparently functus officio as a municipality.

have the benefit of prospective votes from members of the Negro race. They urge that the time from the entry of the aforesaid order of this court until the "cut-off" date for registration for voting in such elections, fixed by state law[2], made it impossible for Negroes to register in sufficient numbers to play any significant part in these municipal elections and that it would have been futile for any Negro to qualify as a candidate in such elections[3].

The order of this court in *United States* v. *Campbell* was based upon findings of discrimination against Negroes in the registration processes as they had been theretofore administered. Said order established lower standards for the registration of Negroes for a period of one year as provided by 42 U. S. C. § 1971 (e). Registration on the books for county elections is a prerequisite to registration on the registration books of a municipality. None of the municipal registrars were in the *Campbell* case.

In outline form, the substance of what plaintiffs seek by injunction is:

1) A delay of the aforementioned municipal primary and general elections and the fixing of new dates therefor by this court.

2) A fixing of a "cut-off" date for qualification of candidates for such rescheduled elections.

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2. A municipal elector must have registered in the municipality more than four months prior to the general election in order to vote in the primaries and in the general election. Mississippi Code Ann. 1942 (Recompiled) § 3374-60. In this case, the last day for registration passed prior to the entry of this court's order of April 8, 1965, in *United States* v. *Campbell*.

3. Three hundred and six Negroes registered on the books of Sunflower County between entry of the April 8 order and the date of the hearing in this case, April 29. However, those records do not reveal which, if any, of those registrants resided in the municipalities with which we are here concerned, nor the number of registrants residing in any one of those municipalities.

3) A fixing of a "cut-off" date for registration to vote in such elections.

4) A suspension of the requirement that poll taxes shall be paid as a requirement for voting[4], or[5]

5) As an alternative to 4), that Negroes be permitted to pay before such delayed elections poll taxes payable for 1963 and 1964[5].

Technically, when viewed only as a class action, this suit must fail. Only two of the six remaining municipalities are represented by any party plaintiff—Ruleville and Sunflower.

RULEVILLE: One Negro plaintiff testified that she is a qualified elector in the county and in this municipality, that she did not qualify as a candidate for office before the deadline (footnote [2], supra) since so few Negroes were qualified to vote there and she would have had no chance to succeed, but that if the elections were delayed a sufficient length of time, she would be a candidate for mayor in the Democratic primary. (This witness also testified that since April 8, she had been busy urging and organizing Negroes of Ruleville to register under the lower standards.)

There is no evidence that any other Negro would be a candidate in such delayed elections for any office in this municipality.

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4. Poll taxes by statute must be paid for the two years preceding the year in which the offer to vote is made. Mississippi Code Ann. 1942 § § 3130, 3160, 3235.

5. Plaintiffs claim that most Negroes have never paid poll taxes because they could not register to vote. There is no credible proof in this record that such is the case. Poll taxes are taxes payable by every adult citizen (except for some exemptions) whether the person ever registers or ever votes, if registered. Mississippi Code Ann. 1942 (Recompiled) § 9751.

Therefore, since there is no evidence of any class of prospective Negro candidates, she cannot represent a non-existent group; and, since she is a qualified voter in Ruleville, she is not a member of the class, composed of those people who are not presently qualified to vote, that she seeks to represent.

SUNFLOWER: One Negro qualified elector testified that he had been busy since April 8 getting Negroes from this municipality to register. He lives outside the municipality and thus, in no event, could he be now legally qualified to vote in Sunflower municipal elections.

Another witness testified that she moved into Sunflower on May 1, 1963, that she was a qualified voter in the county[6] and that she was working to get "people" to register. She also testified that if the elections were delayed, the Negro people would consider at an early date whether to offer Negro candidates or not, but that at the time of hearing she had no knowledge of any prospective Negro candidates in that municipality. She admitted that she had not paid poll taxes and thus is not now a qualified voter.

Hence, neither of these two qualify as plaintiffs in a class action since neither of them belongs to the class they seek to represent. Neither is a prospective candidate for public office therein.

But, going beyond technicalities and considering the merits, plaintiffs' case must also fail. Facts not in dispute make this so. Some of those facts will be mentioned.

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6. She thus could have registered to vote in municipal elections. Mississippi Code Ann. 1942 (Recompiled) § 3374-60.

1) The last day under state law for a person to register to vote in a municipal election is four months prior to the general election. General elections are fixed at June 8 for 1965. Thus, the last day to register on any of the registration books of the six remaining municipalities in order to vote in their elections this year was February 8, 1965. The aforementioned "freezing order" of this court by which lower standards for registration for Negroes were established was entered on April 8, 1965.

2) There is no evidence in the record here that there has been any discrimination against Negroes in Sunflower County with respect to the payment of poll taxes. Thus, there is no evidential justification for any effort on the part of plaintiffs to abrogate or change by injunction the laws of Mississippi (which at this time are valid) requiring payment of poll taxes in order to vote.

3) There is only one prospective Negro candidate in one municipality in Sunflower County—none in any of the other five municipalities remaining. She could have qualified as a candidate in the elections as now scheduled. She chose not to do so on the obvious assumption that all Negro voters would vote for all Negro candidates and that white voters would vote only for white candidates. This court cannot indulge in this assumption.

4) In four of the six municipalities with which we are concerned, only one candidate qualified for each office in the primary elections. These candidates have been certified to the election commission and ballots for the general election have been printed or ordered from the printer.

5) In the other two municipalities of concern here, ballots for the primary elections have been printed.

6) Allegations of the complaint are in general, conclusory, argumentative form. They were not originally supported by affidavit, but to sustain these allegations the affidavit of one plaintiff, on information and belief, was offered by plaintiffs. This can be given little weight, especially since this affiant-plaintiff testified as a witness on the hearing.

7) There is no evidence in this case that any Negro resident within any municipality of Sunflower County was ever discriminated against by the county registrar, except those given specific relief by this court's aforementioned order of April 8. If they were found qualified under the lowered standards, on the face of applications submitted *before the order*, they were to be registered *as of the date of such application.*

In sum, on the record before this court, any or all of the relief sought by plaintiffs would be for the use and benefit of the one prospective Negro candidate in delayed and rescheduled elections in Ruleville. And, the equities in favor of defendants and these municipalities, inherent in the outlined undisputed facts, far outweigh the less than minimal equities which might be considered as shown in her favor.

The prayer of the complaint for a temporary injunction will be denied.

This the 4th day of May, 1965.

Claude F. Clayton,
District Judge.

Mrs. Fannie Lou HAMER et al.,
Appellants,

vs.

Cecil C. CAMPBELL, Circuit Clerk and Registrar of Sunflower County, Mississippi, et al., Appellees.
No. 22552.

United States Court of Appeals
Fifth Circuit.
March 11, 1966.

Before HUTCHESON and BROWN, Circuit Judges, and MORGAN, District Judge.

JOHN R. BROWN, Circuit Judge:

A Negro citizen, because of a pattern and practice of racial discrimination, has been denied the right to register to vote. After she registers pursuant to a Federal Court order, she will be denied the right to vote in a municipal election because she has failed to pay poll taxes for two preceding years and because she has not registered within the time allowed by state law—a deadline two months prior to the Federal Court order permitting her to register. Does she have standing to bring a class action on behalf of Negro voters similarly situated to enjoin the municipal election? We hold she does and reverse the holding of the District Court to the contrary. Could and should the District Court have enjoined the election? We hold that the District Court erred in failing to do so. Finally, under the special circumstances of this case, we remand to the District Court with instructions to set aside the election it should have initially enjoined.

On April 8, 1965, in United States v. Campbell, N.D. Miss., ... F.Supp. ....., the Federal District Court found that the Registrar of Sunflower County, Mississippi, for

many, many years had deprived Negro citizens of their right to register to vote by means of a pattern and practice of racial discrimination[1] and, pursuant to 42 U.S.C.A. § 1971 (e), enjoined these practices and entered a "freeze" order for a period of one year to allow the deprived Negroes a chance to catch up and to participate in the electoral process on the same basis on which white citizens have participated.[2] Within three weeks of the District Court's order 306 Negroes had registered for the first time in Sunflower County.

Unfortunately, their success in registering was illusory. Municipal elections in Sunflower County were scheduled for June 8, 1965, with primaries for these elections to be held on May 11 and 18. Because of two requirements of Mississippi law, these newly registered Negroes could not participate as voters in these elections. First, a municipal elector must have registered in the municipality more than four months prior to the general election in order to vote in the primaries and in the general election. Miss. Code Ann. § 3374-60 (1942 recomp. ed.). In this case the

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1. The District Court found the following statistics for Sunflower County:

	Whites	Negroes
Persons of voting age	8,785	13,524
Persons on current registration books	4,082	155
Percentage registered	80%	1.1%
Persons on current poll books*	6,128	95

*Those who have paid poll taxes for the two years next preceding the current year and who are on the registration books.

2. See, e. g., Louisiana v. United States, 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed. 2d 709; United States v. Ramsey, 5 Cir., 1965, 353 F.2d 650 [No. 22315, Nov. 12, 1965]; United States v. Ward (Louisiana), 5 Cir., 1965, 349 F.2d 795; United States v. Lynd, 5 Cir., 1965, 349 F.2d 785 (appeal); United States v. Ward (Miss.), 5 Cir., 1965, 345 F.2d 857.

cutoff date was February 8, two months prior to the § 1971 (e) Federal Court order facilitating Negro registration in the county.[3] Second, poll taxes must be paid for the two years preceding the year in which the offer to vote is made. Miss.Const. § 241; Miss.Code Ann. §§ 3130, 3160 (1942 recomp. ed.).[4] Thus, Negroes, who were given their first opportunity to register by the April 8, § 1971(e) order, would be unable to vote in the forthcoming municipal elections, since it would be impossible for them to meet the four-month registration requirement and highly unlikely for them to be able to meet the poll-tax requirement. Similarly, because of state law, it would be impossible for any of these newly registered Negroes who desired to run for municipal office to qualify as candidates. In order to be a candidate for municipal office, a citizen of a municipality must be a qualified elector (i.e., must meet the four-month registration and poll-tax requirements).[5] Miss.Code Ann. §§ 3374-42-55. Thus, for four years Negroes would be governed by city officials whose election they had no opportunity to participate in, either as voters or candidates.

On April 23 five Negro residents of Sunflower County filed this class action on behalf of all Negro voters and potential candidates of the County. After reciting the above facts, the complaint sought a judgment: (1) de-

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3. County registration is a prerequisite to municipal registration in Mississippi. Miss.Code Ann. § 3374-60 (1942 recomp. ed.).

4. The recent changes in Mississippi's voter requirements (e. g., elimination of the good-moral-character, the duties-of-citizenship, and the read-and-interpret tests), referred to in United States v. Ramsey, supra, 353 F.2d 650, at 653 n. 8 [No. 22315, Nov. 12, 1965], did not affect this requirement.

5. Also, the final day for qualifying as a candidate for the May 11 primary elections was March 12.

laying the municipal elections and fixing new dates therefor, (2) fixing a new cutoff date for voter registration for the delayed elections, (3) fixing a new cutoff date for qualification of candidates, and (4) suspending the requirement that poll taxes shall be paid as a prerequisite to voting, or, in the alternative, allowing *nunc pro tunc* payment of 1963 and 1964 poll taxes.[6] The plaintiffs also requested a preliminary injunction against the holding of the primary and general elections.

Although plaintiffs sought to enjoin elections in six municipalities[7] in the County, they proceeded at the outset on the theory that they could represent a county-wide class of Negro voters and candidates. We agree with the District Court that under these circumstances there could be no county-wide class for the purpose of enjoining municipal elections throughout the county. We also agree with the District Court that as to four of the municipalities[8] there was clearly no proper plaintiff-representative

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6. Although it would have been possible merely to fix new cutoff dates for registration, qualification of candidates, and payment of poll taxes prior to the elections as *originally* scheduled, the District Court had ample basis for presumably believing that the short time between the filing of this suit and the scheduled primaries made this impractical. The Court undoubtedly assumed that for the other relief sought (2-4) to be effective, it would be imperative that the elections be postponed.

7. Sunflower, Moorehead, Ruleville, Drew, Inverness, and Doddsville. At the trial the plaintiffs agreed to a dismissal of the Town of Indianola, since it appeared that under that town's special charter no municipal elections were to be held until November 23, 1965. The District Court held that the Town of Rome was apparently no longer in existence; no defendant from Rome was notified of the hearing, and counsel for the other defendants informed the Court that Rome had surrendered its charter and no longer conducted elections.

8. Moorehead, Drew, Inverness, and Doddsville.

included in the original complaint. As to the two remaining municipalities, Ruleville and Sunflower, the District Court held that in spite of the fact that two plaintiffs resided therein, "technically, when viewed as a class action, this suit must fail."

[1, 2] We cannot say the District Court erred in its holding as to the Ruleville resident, Mrs. Hamer. Testifying that she desired to run for mayor, she purported to represent potential Negro candidates for municipal office. The principal obstacle to her effort was that she had become a qualified elector by registering and paying all necessary poll taxes prior to the March 12 cutoff date for filing as a candidate, and the election officials of Ruleville testified that had she so filed, her name would have been put on the ballot. She did not dispute this, but instead explained her failure to file by the assumption that it would be impossible to win with only one percent of her race eligible to participate in the election. See note 1, supra. We believe the District Court was warranted in holding "this court cannot indulge in this assumption." Also, there was no showing that any other Negroes intended to run for municipal office in Ruleville. Thus, there was no class of potential Negro candidates, and even if there were, Mrs. Hamer could not represent it since she could have been a candidate had she chosen to do so. Without a class on the one hand or a proper representative on the other, a class action pursuant to Rule 23 (a) must fail. It is elementary that "an individual suing in behalf of the members of a class must be a member of the class which he is supposed to represent." 2 Barron & Holtzoff, Federal Practice and Procedure §567, at 308 (Wright rev. 1961). See 3 Moore, Federal Practice #23.04 (2d ed. 1964). As to Mrs. Hamer and Ruleville, the District Court correctly held that no class action could be maintained on the basis of the original parties plaintiff.

The Town of Sunflower is a different matter. The District Court erred in its holding as to the Sunflower resident, Mrs. King. The Court found that although she did not register until after its § 1971(e) order, she had failed to pay the poll tax for the two preceding years (1963 and 1964), and thus even had there been no discriminatory practice preventing her from registering, she would still be unable to participate in these elections. It is true that there was no evidence of any discrimination in the acceptance of poll taxes, that Mrs. King could have paid, and that theoretically she had an obligation to pay, whether or not she was registered to vote.[9] But we do not believe that her failure to do so should prejudice her right to maintain this class action. Two considerations buttress this belief.

The first is United States v. Dogan, 5 Cir., 1963, 314 F.2d 767, where we considered Mississippi's poll tax requirement and held that since it had been used as an engine of discrimination, its use should be enjoined. We also held the District Court can, in the exercise of its broad equitable powers, allow the payment of overdue poll taxes *nunc pro tunc* if necessary to remedy the past discrimination. Such relief is much akin to the judicial freeze order which we have so often sanctioned in voter registration cases (see note 2, supra) and which, indeed, the District Court used in United States v. Campbell. Both are recognitions of the judicial duty to eradicate for the future the consequences of part discriminations and to assure that the abuses do not continue. Though in *Dogan* we found discrimination in the acceptance of poll taxes among those (white and Negro) seeking to pay them,

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9. A poll tax of $2 is payable each year by February 1 of that year by every inhabitant of the State between the ages of twenty-one and sixty. Miss.Const. § 243; Miss.Code Ann. §§ 9751, 9919.5.

while there was none here, we would do violence to the *raison d'etre* of doganizing, and freezing, were we to limit this relief to the situation we found there. There we said, "A glance at the constitution and statutes of Mississippi reveals the close tie-in between payment of poll taxes and voting * * *." 314 F.2d at 773.[10] The only consequence of failure to pay poll taxes is loss of the franchise. We should not blind ourselves to the futility of payment by citizens who could not vote anyway. The plaintiffs here only want "for the Court to see what '[a]ll others can see and understand * * *'" United States v. State of Mississippi, S.D.Miss., 1964, 229 F.Supp. 925, 998 (dissenting opinion), reversed, 1965, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717. The relief we felt proper in *Dogan*—allowing payment of poll taxes *nunc pro tunc*—just happened to be in response to a situation where the poll tax itself was the vehicle of the past discrimination. But in *Dogan* and here that relief is proper *because* the poll tax is an obstacle to correcting the effect of past discrimination, regardless of the means by which it was effected.

The second consideration is the Voting Rights Act of 1965.[11] We have recently held that even though this Act

10. The District Judge in United States v. Campbell recognized this implicit relationship. In paragraph 34 of his Findings of Fact, after stating the number of citizens registered, he gave the number on the current poll books—those who by virtue of their payment of the poll tax were eligible to vote. See note 1, supra. Then he said, "The aforementioned discriminatory conduct of the defendant and his agents is a principal cause of the great disparity in the number of persons of each race who are registered *and eligible to vote.*" (Emphasis added) The figures themselves reveal the obvious: neither unregistered whites nor unregistered Negroes pay the poll tax, theoretical duties of citizenship notwithstanding.

11. Pub.L.No.89-110, 89th Cong., 1st Sess., 79 Stat. 437, 42 U.S.C.A. § 1973 et seq., approved August 6, 1965.

became law subsequent to the decisions below, we must apply it on appeal.[12] After declaring that the poll tax "(i) precludes persons of limited means from voting * *, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose *or effect* of denying persons the right to vote because of race or color," (emphasis added) Congress directs the Attorney General to institute actions against states or political subdivisions for declaratory judgment or injunctive relief against the enforcement of the poll-tax requirement. § 10 (a), (b). Then the Act provides:

> "(d) During the pendency of such actions, and thereafter if the courts * * * should declare the requirement of the payment of a poll tax to be constitutional, no citizen * * * who is a resident of a State * * * with respect to which determinations have been made under subsection 4(b) * * * during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. * * *"

In this case we have all the elements necessary to trigger §10(d): pendency of proceedings by the Attorney General to enjoin Mississippi's poll tax;[13] determinations un-

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12. See United States v. Ward (Louisiana), 5 Cir., 1965, 352 F.2d 329, modifying on rehearing 349 F.2d 795; United States v. Ramsey, 5 Cir., 1965, 353 F.2d 650 [No. 2315, Nov. 12, 1965].

13. United States v. Mississippi, S.D.Miss., No. 3791, pending. See also United States v. Texas, W.D.Tex., 1966, 252 F.Supp. 234 [Feb. 9, 1966] (holding Texas poll tax unconstitutional).

der §4(b) with respect to Mississippi;[14] and an offer by these plaintiffs 45 days prior to the general election to pay poll taxes for the two preceding and current years.[15] In the 1965 Act Congress has clearly recognized what the plaintiffs here ask us to recognize: that regardless of nondiscriminatory use of the poll tax, it often has the "effect of denying persons the right to vote."[16] Congress also recognized that "[t]he fact that there was not more evidence presented * * * on the discriminatory operation of the poll tax may be in part attributable to the widespread discrimination through literacy tests, vouching requirements, economic reprisals and even violence, that has kept most Negroes from every reaching the poll tax stage."[17] And Congress has now provided the remedy which the plaintiffs were denied by the District Court.

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14. See 30 Fed.Reg. 9897 (August 7, 1965); United States v. Ramsey, 5 Cir., 1965, 353 F.2d 650 [No. 22315, Nov. 12, 1965].

15. In their complaint filed April 23, 1965, 46 days prior to the general election on June 8, plaintiffs requested that they and all those for whom they sued be allowed to pay *all* overdue poll taxes *nunc pro tunc*. In contrast, § 10(d) of the 1965 Act requires payment of the poll tax for the current year only: "The effect of this provision was to waive payment of poll taxes for the years prior to the one in which the applicant sought to make payment to an examiner." S.Rep.No.162, 89th Cong., 1st Sess. (1965) [U.S.Code Cong. & Ad.News, p. 2566].

16. S.Rep.No.162, 89th Cong., 1st Sess. (1965) [U.S.Code Cong. & Ad.News, p. 2571]: "Since almost all Negroes deprived of their voting rights by those 'tests or devices' that this bill is directed against, * * * have not paid [the poll tax] in previous years, the cumulative provisions of the State laws are in effect. A Negro in Mississippi, therefore, whose income reaches the nonwhite State median would have to pay over 12 percent of 1 week's income in order to vote. * * * For the many rural Negroes who buy on credit and transact most of their business in a bartering fashion, the funds needed for poll tax payments are almost impossible to raise in their noncash economy."

17. H.R.Rep.No.439, 89th Cong., 1st Sess. (1965) [U.S.Code Cong. & Ad.News, p. 2452].

[3] But without determining that the congressional remedy provided by the 1965 Act is available to these plaintiffs, and regardless of whether the 1965 Act would produce the same result we reach here, we follow a *Dogan* freeze approach in devising suitable equitable measures and, in so doing, we embrace as a part of court-created relief the broad policies adopted by the Congress. And this approach leads to the conclusion that for the purpose of determining the existence of a class of eligible voters and the standing of a named plaintiff to represent that class, the failure to meet the 2-year poll-tax requirement is of no significance in this case. Mrs. King had standing to bring this action on behalf of the Negro residents of the Town of Sunflower.

[4] Having so concluded, we now reach the question of whether the District Court should have enjoined the municipal election of the Town of Sunflower. There can be no question that a District Court has the power to enjoin the holding of an election. In State of Alabama v. United States, 5 Cir., 1962, 304 F.2d 583, we emphasized the broad equitable powers of the District Court to mould relief sufficient to wipe out the effects of racial discrimination. And the recent reapportionment cases remove any doubt that these powers encompass the power to enjoin an election.[18] To be sure, the Supreme Court in Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; Roman v. Sincock, 1964, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620; and Davis v. Mann, 1964, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609, has held that in some cases it might be proper not to enjoin an election to be conducted

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18. For cases where elections have been enjoined, see, e. g., Bush v. Martin, 1963, S.D.Tex., 224 F.Supp. 499, aff'd, 1964, 376 U.S. 222, 84 S.Ct. 709, 11 L.Ed.2d 656; Calkins v. Hare, E.D.Mich., 1964, 228 F.Supp. 824; Ellis v. Mayor and City Council of Baltimore, D.Md., 1964, 234 F.Supp. 945.

pursuant to an unconstitutional plan. But appellees' reliance on these cases is misplaced. The shoe will not fit. First, the Court clearly warned that it "would be the *unusual* case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."[19] Second, the reapportionment cases deal with dilution of the vote. This case involves a deprivation. Third, in the reapportionment cases the Court is dealing with a legislative function. Staying judicial relief may give the State a chance to clean its own house and thus avoid a court-imposed, nonlegislative disruption of its election process. In effect, the substantive relief ordained by the court is to come from action by the legislature. Hence a court may properly withhold injunctive relief in order to allow the State to remedy dilution of the franchise. But the municipal bodies involved in these elections have no power to eradicate the deprivation of the franchise. Relief, if it is to be had, must perforce come from the Court or the voters must simply be told to wait four more years. That denial of this fundamental right cannot be justified in the name of equity.[20]

[5] Since the District Court should have enjoined the election in the Town of Sunflower, we have concluded that under the special circumstances of this case we must now require that the District Court set it aside. When the appellants appealed the District Court's May 4 denial

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19. Reynolds v. Sims, 1964, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393, 12 L.Ed.2d 506, 541.

20. In denying the injunction on the merits, the District Court pointed to the fact that the ballots had already been printed. We do not believe that the slight inconvenience to the appellees in reprinting the ballots justified the Court's refusal to enjoin the elections.

of a preliminary injunction, they requested an injunction pending appeal. Recognizing its importance, this Court heard the movants orally but denied the motion on May 10 "but without prejudice to the rights of any of the parties upon the hearing on the merits." Appellants then applied for an expedited hearing in hope that this Court could render a decision before the June 8 general elections. Again after hearing the parties on May 20, we denied this application with this significant comment:

> Noting, as we do, that respondents [appellees], in their opposition to said application, state that "if this Court finds that certain constitutional rights belonging to the appellants have been discriminatorily denied, and that the District Court should grant certain specific relief, said relief can be granted at any time in the future and appellants will not be irreparably injured because of any delay in the granting of said relief," it is apparent that respondents concede the power of the Court to grant appellants full relief in the same manner as if the said election had been enjoined by the District Court, *even to the extent of declaring said election to be void.* Under such circumstances, and in view of the fact that this Court will not hold a regular session during the week of May 31st, or at any time prior to the said election date, and in view of the many serious legal questions involved in the issue now presented on this appeal, the application * * * is denied. [Emphasis added.]

Having concluded that the Sunflower municipal election should have been enjoined, we now must set it aside in order "to grant appellants full relief in the same manner as if the said election had been enjoined."

This action does not mean that we necessarily would set aside every election in which a substantial number of citizens have been denied the right to vote. This is not a case where an election is challenged for the first time

after it is held. Here appellants attempted to enjoin the election, and failing where they should have succeeded, they were diligent in seeking to have this failure rectified by our reversal prior to the election. Our absence of facilities to rectify rapidly should not now prevent us according full relief to appellants.

The Sunflower election must be set aside, but what should be done in the cases of the other municipalities[21] from which the District Court properly concluded there were no named plaintiff-representatives? During the May 29 hearing on the preliminary injunction it became obvious that the class action would have to stand on its own as to each municipality and that as to some municipalities there were no proper representatives. Thus, counsel for the plaintiffs requested leave to file an amended complaint adding plaintiffs. The District Court was willing to allow this if counsel would consent to reopen the hearing so that the defendants would have a chance to controvert the standing of such added parties. This caused a dilemma for plaintiffs' counsel: as he explained to the Court, reopening the hearing would delay the decision on the preliminary injunction beyond the scheduled primaries. So counsel understandably consented to termination of the hearing on the preliminary injunction. The preliminary injunction was denied on May 4 and on May 6 notice of this appeal was filed. On May 8 appellants filed a "Second Supplemental Complaint" adding parties-plaintiff[22] and requesting an ex parte temporary restraining order. Noting that there was not enough time before

21. Ruleville, Moorehead, Drew, Inverness, Doddsville.

22. Plaintiffs were added from the towns of Sunflower, Moorehead, Ruleville, Drew, and Inverness. The "Second Supplemental Complaint" alleges that these parties "want to propose Candidates for elections," as well as to vote in the elections.

the May 11 primaries for a hearing on this request, the District Court refused to grant it ex parte. This refusal is also on appeal here.

[6] Appellees in effect assert that none of the District Court's actions concerning the "Second Supplemental Complaint" are before us. They argue that the May 6 appeal from the May 4 denial of the preliminary injunction divested the District Court of jurisdiction to consider the May 8 supplemental complaint. They cite a number of cases, all of which deal with an appeal from a final judgment.[23] But the denial of the preliminary injunction on May 4 was not a final judgment, and the appeal filed on May 6 was an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b) and as such did not divest the District Court of jurisdiction of the supplemental complaint. In United States v. Lynd, 5 Cir., 1963, 321 F.2d 26, 28, we held that "* * * appeal from the denial * * * of a preliminary injunction should not ordinarily delay the final trial of the case on its merits." See Wooten v. Ohler, 5 Cir., 1962, 303 F.2d 759; Janousek v. Doyle, 8 Cir., 1963, 313 F.2d 916; 3A Barron & Holtzoff, Federal Practice and Procedure § 1558 (Rules ed. 1964 Supp.).

Alternatively, appellees also argue that on the merits the District Court was correct in denying the ex parte restraining order since the appellants were given a chance to reopen the preliminary injunction hearing on the matter of additional parties but refused to do so. But we do not reach this question since it is not now a problem of whether error was committed. It is now a question of what is before the trial Court on remand. The "Second

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23. Hunter Douglas Corp. v. Lando Prods., 9 Cir., 1956, 235 F.2d 631; In re Federal Facilities Realty Trust, 7 Cir., 1955, 227 F.2d 651; Brasier v. United States, 10 Cir., 1955, 229 F.2d 176; Jordan v. Federal Farm Mortgage Corp., 8 Cir., 1945, 152 F.2d 642.

Supplemental Complaint" properly pends before the District Court.[24] It is, therefore, a part of the case, which we remand by virtue of our holding that Mrs. King is an adequate class representative as to the Town of Sunflower. Of course, as our opinion reflects, a class must be adequately represented, and to the extent that this is factually at issue, there must be an adjudication of it. Consequently on the remand of this case to the District Court, it will have to determine, in accordance with this opinion, the standing of the plaintiffs added by the "Second Supplemental Complaint." If the Court finds that there are named plaintiffs who properly represent the Negro voters of any or all of the other municipalities (see note 22, supra) of the county, it should set aside the elections in such municipalities just as it must set aside the election in the Town of Sunflower. Again we emphasize that this is not a case where parties are being added after an election is held for the purpose of setting aside that election. Here, for the purpose of enjoining them, parties were seriously added prior to the time of holding the elections.[25]

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24. Subsequent to the District Court's denial of the relief requested in this complaint and plaintiffs' appeal of this denial, hence not reflected in the record before this Court, the plaintiffs filed a "Third Supplemental and Amended Complaint" with the District Court on May 14, 1965, after the primary elections of May 11 had been held. This third complaint, without adding new parties plaintiff, requests that the primaries be set aside. The District Court refused to hold a hearing on this complaint on the ground that it lacked jurisdiction pending the appeal of its prior orders to this Court. Though superfluous now in light of our present holding that the elections must be set aside in municipalities from which there is a proper representative, this third complaint also pends before the District Court.

25. Though the plaintiffs named in the original complaint sought to represent residents of the Town of Doddsville, note 7, supra, the trial Judge correctly determined that there was no representation of these residents. And, perhaps inadvertently,

In setting aside the election of the Town of Sunflower and the elections of any other towns which the District Court on remand finds to be represented by a proper plaintiff, the District Court has wide discretion to devise a plan for new elections.[26] But in some appropriate fashion the plan will have to (1) schedule new primaries and general elections, (2) set a new cutoff date for registration, and (3) set new cutoff dates for filing as candidates for the primaries. For the reasons stated herein, any person registered and otherwise entitled to vote in these new elections shall not be denied the right to vote for failure to pay poll taxes if he tenders payment of such tax for the two preceding years (two years in all) to the appropriate State or local official at least 45 days prior to the election, whether or not such tender would be timely or adequate under State law.

Reversed in part, affirmed in part, and remanded.

HUTCHESON, Circuit Judge.

I concur in the result.

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none of the plaintiffs added by the "Second Supplemental Complaint" was alleged to reside in Doddsville. See note 22, supra. But since the elections for that town were challenged, even though imperfectly, prior to the election, we think in light of what we have said, the District Court on remand has considerable discretion in determining whether to allow any effort at such time to add a plaintiff who purports to represent the residents of Doddsville.

26. In seeking the injunction, the plaintiffs conceded that the incumbent municipal officials be allowed to remain in office until the rescheduled elections were held. Likewise, in now seeking to have the elections set aside, they recognize that the winners of the invalid elections held in June 1965 should be allowed to hold their positions until new elections are held. Here also the District Court has ample discretion on remand to devise a plan which will cause the least disruption of municipal government.

APPENDIX "B"

Pertinent Statutes and Constitutional Provisions

Title 28 U.S.C.

§1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended July 25, 1958, Pub. L. 85-554, §1, 72 Stat. 415.

§1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custome or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, §121, 71 Stat. 637.

§1344.

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, wherein it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law,

to enforce the right of citizens of the United States to vote in all the States, June 25, 1948, c. 646, 62 Stat. 932.

Title 42 U.S.C.

§ 1971.

(a) (1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall—

(A) in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any Federal election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

(C) employ any literacy test as a qualification for voting in any Federal election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished

to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to sections 1974-1974e of this title: *Provided, however,* That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

(3) For purposes of this subsection—

(A) the term "vote" shall have the same meaning as in subsection (e) of this section;

(B) the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection

(a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any Federal election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(e) In any proceeding instituted pursuant to subsection (c) of this section in the event the court finds that

any person has been deprived on account of race or color of any right or privilege secured by subsection (a) of this section, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed

if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 16 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement

of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: *Provided, however,* That such applicant shall be qualified

to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

When used in the subsection, the word "vote" includes all action necessary to make a vote effective including but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a) of this section; and the words "qualified under State law" shall mean qualified according to the laws, customs or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) of this section in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

(f) When used in subsection (a) or (c) of this section, the words "Federal election" shall mean any general, special, or primary election held solely or in part for the

purpose of electing or selecting any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives.

(g) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

(h) In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately

three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceeding authorized by this subsection, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. R.S. § 2004; Pub.L. 85-315, Pt. IV, § 131, Sept. 9, 1957, 71 Stat. 637; Pub.L. 86-449, Title VI, § 601, May 6, 1960, 74 Stat. 90; Pub.L. 88-352, Title I, § 101, July 2, 1964, 78 Stat. 241.

§1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. §1977.

§1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. §1979.

The Voting Rights Act of 1965

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is author-

ized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An ex-

aminer shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

Constitution of the State of Mississippi

§241.

Every inhabitant of this state, except idiots, insane persons and Indians not taxed, who is a citizen of the United States of America, twenty-one years old and upwards, who has resided in this state for two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, and who has paid on or before the first day of February of the year in which he shall offer to vote, all poll taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid such taxes, is declared to be a qualified elector; but any minister of the gosepl in charge of an organized church, or his wife legally residing with him, shall be entitled to vote after six months' residence in the election district, incorporated city or town, if otherwise qualified.

Mississippi Code 1942, Annotated

§3235.

Every inhabitant of this state, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one (21) years old and upwards, who has resided in this state two (2) years, and one year in the election district or city, town or village in which he offers to vote, and who is able to read and write any section of the Constitution of the state and who can give a reasonable interpretation thereof, and who can demonstrate a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government, and who shall have been duly registered as an elector by an officer of this state under the laws thereof, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid all poll taxes which may have been legally required of him, and which he has had an opportunity to pay according to law, for the two (2) preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid such poll taxes on or before the first day of February of the year in which he shall offer to vote, shall be a qualified elector in and for the election district or city, town or village of his residence, and shall be entitled to vote at any election held not less than four (4) months after his registration; but any minister of the gospel, in charge of an organized church, or his wife, legally residing with him, shall be entitled to vote after six (6) months' residence in the election district, city, town or village, if otherwise qualified. No others than those above included shall be entitled, or shall be allowed, to vote at any election; provided, that a person unable to read or write by reason of physical disability shall, if

otherwise qualified, nevertheless be entitled to vote, and provided further that any new or additional qualifications herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954; except that any person registering after the effective date of this act shall be of good moral character as required by Section 241-A of the Mississippi Constitution.

§9751.

There is hereby assessed and imposed annually on every inhabitant of the state of Mississippi, male or female, between the ages of twenty-one and sixty years, except persons who are deaf and dumb or blind or who are maimed by the loss of hand or foot, a poll tax of two dollars which shall be a part of the common school fund and which shall be used as provided by law.

The Sheriff and Tax Collector of each county shall collect each year the poll tax due by the citizens of his county and shall issue the required receipt and report the collection as now provided by law.

The board of supervisors of any county are hereby empowered, when in their discretion the same shall be necessary for the purpose of aiding the common schools in said county, to increase the poll tax in said county to a sum not exceeding three dollars in any one year on each poll, provided, that such increase in poll tax be ordered at the same meeting at which the tax levy for such county is fixed by said board.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 27 1966
JOHN F. DAVIS, CLERK

No. 311

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

CECIL C. CAMPBELL, CIRCUIT CLERK AND REGISTRAR OF SUNFLOWER COUNTY, MISSISSIPPI, ET ALS.,
Petitioners,

VS.

MRS. FANNIE LOU HAMER, ET AL.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 311

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

CECIL C. CAMPBELL, CIRCUIT CLERK AND REGISTRAR OF SUNFLOWER COUNTY, MISSISSIPPI, ET ALS.,
Petitioners,

VS.

MRS. FANNIE LOU HAMER, ET AL.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This reply is devoted to answering the type-written Brief in Opposition to Petition for Certiorari and clearing up certain misconceptions therein contained.

First, Respondents take the position in their Brief (Pages 3-6) that the holding of the Court of Appeals as to standing to maintain a class action was correct because Mrs. Fannie Lou Hamer only represented a class of prospec-

tive candidates in the municipal elections, while Mrs. Annie Mae King represented a separate and distinct class of prospective voters in said elections.

The Court of Appeals held that Mrs. Hamer had no standing to maintain a class action, but that Mrs. King did. We do not find in the Opinion of the Court of Appeals the distinction made by Respondents between the class represented by Mrs. Hamer and the class represented by Mrs. King. Assuming, however, that Respondents are correct in their view of the class represented by each of these persons and that the Plaintiffs below had the right and power to define their respective classes, then it is patently obvious that the Court of Appeals erred in ordering the District Court to set any new cutoff dates for filing as candidates in the municipal elections to be re-held. Since it is unchallenged that the Court of Appeals correctly held that Mrs. Hamer had no standing to sue, and since she was the only party who purported to represent a class of prospective candidates, then, in no event should the Court of Appeals have ordered relief given to prospective candidates. The relief ordered should have been confined to the class of prospective voters only. We contend, however, that the Court of Appeals should have given no relief to either class of Plaintiffs for the reason stated in the Petition for Certiorari.

Second, as to our contention that the Court of Appeals erred in holding that the District Court should have suspended the Mississippi poll tax requirement for voting as to Plaintiffs and their classes, we wish to re-emphasize that we do *not* contend that the Mississippi poll tax requirement for voting is *presently* valid. Respondents seem to assume that that is our position in their Brief (Page 5) and make a point of ridiculing such a contention. We *do* maintain that the Mississippi poll tax requirement for

voting *was* perfectly valid at the time the District Court decided this case on May 4, 1965. This Court's decision in the case of *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, was not rendered until March 24, 1966. The whole thrust of the Opinion of the Court of Appeals is that the District Court should have enjoined the holdings of the municipal elections on May 4, 1965. The Court of Appeals specifically held that the District Court erred in taking into account the Mississippi poll tax requirement for voting in rendering its decision on that date. We submit, for the reasons stated in our Petition for Certiorari (Pages 16-20 of the Petition) that this holding was incorrect, and should be reversed.

Petitioners pray that their Petition for Writ of Certiorari be granted and the decision of the Court of Appeals reversed.

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CERTIFICATE OF SERVICE

I, PETER M. STOCKETT, JR., Assistant Attorney General of the State of Mississippi, Post Office Box 220, Jackson, Mississippi, one of the attorneys for Petitioners in this cause and a member of the Bar of the Supreme Court of The United States, hereby certify that I have on this day mailed, Air Mail, postage prepaid, one true and correct copy of the foregoing Reply of Petitioners to Brief In Opposition To Petition For Certiorari to each of the following attorneys of record for Mrs. Fannie Lou Hamer, et al., Respondents:

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THIS THE _____ day of September, 1966.

PETER M. STOCKETT, JR.